1977

Leroy Schultz v. Jose Quintana : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

LEROY SCHULTZ,	)	
	)	
Plaintiff-Respondent,	)	No. 15134
	)	
-v-	)	
	)	
JOSE QUINTANA,	)	
	)	
Defendant-Appellant.	)	

BRIEF OF RESPONDENT

Appeal from the Judgment of the
Third Judicial District Court of
Salt Lake County, State of Utah
Honorable Ernest F. Baldwin, Jr., Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

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	)	No. 15134
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	)	
JOSE QUINTANA,	)	
	)	
Defendant-Appellant.	)	

NATURE OF THE CASE

Plaintiff sues for recovery of damages for personal injuries caused by defendant's negligence sustained while traveling on a right-of-way.

DISPOSITION IN THE LOWER COURT

After trial on the merits an eight-person jury in the Third Judicial District Court in and for Salt Lake County, State of Utah, with the Honorable Ernest F. Baldwin, Jr. presiding, found in favor of the plaintiff.

NATURE OF RELIEF SOUGHT

Plaintiff-Respondent seeks affirmation of the Lower Court's judgment.

STATEMENT OF FACTS

Appellant, Jose Quintana, was defendant in a personal injury suit tried in the Third Judicial District Court on March

16 and 17, 1977. Plaintiff, Leroy Schultz, alleged that appellant was negligent in the erroneous placement of certain survey stakes on defendant's property, over one of which plaintiff claimed that he tripped, sustaining injuries which allegedly disabled him for 88 days. Plaintiff sought to recover special damages for medical treatment and lost wages as a railroad switchman in the amount of $6,739.19. Plaintiff also claimed general damages for pain and suffering in the amount of $40,000.00.

The survey stake, over which plaintiff claimed that he stumbled, was allegedly driven on or near a right-of-way adjoining the property line of defendant's property at 2422 Lake Street, Salt Lake City, Utah. Appellant had received notice of his successful bid on the property August 21, 1974. Plaintiff had a rightful easement in a coarsely graveled north-south right-of-way abutting defendant's property, by which right-of-way he gained access to parking and a garage at the rear of his property at 2420 Lake Street. Appellant responded in an interrogatory that he drove the survey stakes on or about August 24, 1974, in such a line as to identify and preserve his neighbor's right-of-way which he believed to be between the west boundaries of the Lake Street lots and the east boundary of the property he acquired from the state. The

stakes were allegedly installed in an erroneous attempt to delineate the property line on which a fence was to be built later between defendant's property and plaintiff's right-of-way on the correct alignment as determined by a subsequent professional survey.

On the night of the alleged injury, plaintiff had backed his car south over the gravel driveway turning west onto a second east-west paved public right-of-way that would lead him to Lake Street and thence to work. Plaintiff stopped his car on the paved right-of-way and in the dark rushed to his residence to get his railroad lantern. The plaintiff stumbled and fell over a corner survey stake sustaining injuries to his shoulder, back, ankle and teeth. Plaintiff brought this action to recover damages sustained in that fall. The jury on special verdict found the defendant-appellant 75 percent negligent and awarded damages to the plaintiff in the amount of $3,342.26 plus costs.

ARGUMENT

POINT I

LANDOWNERS OWE A DUTY OF REASONABLE CARE TO USERS OF ADJACENT RIGHTS-OF-WAY.

Plaintiff's status at the time of the incident was that of a traveler or user of a highway. As such the instruction to the jury given by the Lower Court was correct. The Court said:

> "The right of a person to use and enjoy his property is qualified by a duty to exercise reasonable care for the safety of others who may pass by his property.

> The duty of an owner of property adjacent to a right-of-way extends not only to the user of the right-of-way but also to those who reasonably stray a short distance from the right-of-way for a casual purpose.
>
> The owner of land abutting the right-of-way may be negligent creating an unsafe condition thereon.
>
> An unsafe condition as that term is used in these instructions, means a condition on the land in question involving an unreasonable risk of injury to person properly using such area."

The complained of stake was on or near the boundary of defendant's property. It is therefore clear that plaintiff was also on or near the right-of-way at the time of the accident. Plaintiff's testimony shows that plaintiff never left his lawful right-of-way and that in fact the defendant h erroneously placed the survey stakes not on the boundary line, in the plaintiff's rightful right-of-way. The authorities a clear as to both the status and duty owed plaintiff.

In the case of Marsh v. City of Sacramento, 127 C. 2d 721, 274,P.2d 434, 438 (1954), the California Supreme Cour approvingly quoted language from Prosser, Law of Torts, page 352-3. It said:

> "The privilege of a possessor of land to make use of his property is qualified by a due regard for the interests of others who may be affected by it. He is under the obligation to make only a reasonable use of his property, which causes no unreasonable harm to those in the vicinity.
>
> A large number of cases have involved danger to the adjacent highway. The public

> right of passage carries with it an obligation upon the occupiers of abutting land to use reasonable care to see that the passage is safe. They are not required to maintain or repair the highway itself, but they will be liable for any unreasonable risk to those who are on it...The obligation extends also to any conditions, such as an excavation next to the street, which are dangerous to those who use it. The status of a user of the highway has been extended to those who stray a few feet from it inadvertently or in an emergency, or even intentionally for some casual purpose."

The same proposition is also supported by many other jurisdictions, see, e.g. Misterek v. Washington Mineral Products, Inc., 85 Wash. 2d 166, 531 P.2d 805, 807 (1974); Gaylord Container Corp. v. Miley, 230 F.2d 177, 182 (5th Cir. 1956); De Ark v. Nashville Stone Setting Corp., 38 Tenn. App. 678, 279 S.W. 2d 518, 521 (1955), and the Restatement of Torts, 2d, Explanatory Notes Section 368, comment e.

As such the trial court properly instructed the jury on the duty which the defendant-landowner owed to plaintiff.

POINT II

> THE TRIAL COURT PROPERLY REFUSED DEFENDANT'S MOTION FOR A DIRECTED VERDICT.

In Morby v. Rogers, 122 Utah 540, 252 P.2d 231, 232 (1953) this Court outlined the basis for granting a directed verdict by saying that such a verdict would only be granted when reasonable minds could draw only one conclusion on the basis of the facts. This situation is clearly not present in the instant case.

POINT III

THE INADVERTENT MENTIONING OF INSURANCE BY PLAINTIFF'S COUNSEL DID NOT PREJUDICE THE JURY SO AS TO REQUIRE A NEW TRIAL.

In Robinson v. Hreinson, 17 Utah 2d 261, 409 P.2d [illegible] (1965), this Court said the following:

> "In applying the law to the everyday affairs of life it is the duty of the courts to be as practical and realistic as possible and to keep abreast of changing times. For that reason...they are not nearly so apprehensive that mention of this subject in the presence of the jury will be prejudicial as they formerly were. We do not depart from our former position: that the question of insurance is immaterial and should not be injected into the trial; and that it is the duty of both counsel and Court to guard against it. However, the mere mention of the subject does not necessarily in all instances compel the conclusion that it so prejudices the jury that a fair trial cannot be carried out."

This Court further clarified this point in the case of Owens Trucking v. Stewart, 29 Utah 2d 353, 509 P.2d 821, 823. In that case insurance was mentioned twice, once by the plaintiff's attorney after the Court had instructed a witness to refrain from mentioning insurance. Nonetheless, this Court upheld the ruling of the trial Court that an instruction to the jury to disregard the statements was sufficient to correct any alleged prejudice.

Certainly in the present case, where the Court admonished counsel and instructed the jury to disregard the statement, this Court should again rule that insufficient prejudice was present to preclude a fair trial.

POINT IV

IN THE ALTERNATIVE TO POINT III, DEFENDANT'S COUNSEL WAIVED HIS RIGHT TO ASK FOR A NEW TRIAL BY FAILING TO OBJECT IN A TIMELY MANNER.

It is a well established rule that a timely objection is required to reserve a right to appeal, see, e.g. State v. Thompson, 58 Utah 291; 149 P.2d 161, 164; Annot., 45 A.L.R. 2d 318. Defendant's counsel clearly decided that the statements of plaintiff's counsel did not prejudice the jury and consciously decided to proceed with the trial rather than object.

Appellant now requests the application of Rule 60(b), Utah Rules of Civil Procedure, and thereby seeks to obtain relief from the Lower Court's judgment on the basis that his former counsel committed excusable neglect. The thrust of Rule 60(b) is to relieve persons from the omissions of their counsel which eliminates their right to a day in court. Defendant-Appellant had his day in court and followed the decision of his counsel to proceed with the trial. The conscious and reasoned decision of one's attorney, in an area calling for such a decision, is clearly not a case for the application of Rule 60(b).

CONCLUSION

The defendant-appellant owed a duty to the plaintiff-respondent as a user of a right-of-way and the verdict of the jury in the lower court should be affirmed.

Respectfully submitted,

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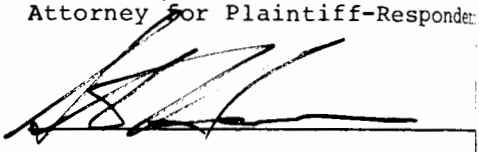

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Respondent were served on Phil L. Hansen, PHIL L. HANSEN AND ASSOCIATES, attorneys for the defendant-appellant, 250 East Broadway, Suite 100, Salt Lake City, Utah 84111, this 11 day of September, 1977.